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Constitutional Law - School Desegregation - Guidelines in Implementation

Eugene P. Daugherity

CONSTITUTIONAL LAW—SCHOOL DESEGREGATION—GUIDELINES IN IMPLEMENTATION

In 1968 the Charlotte-Mecklenburg school system, which encompasses the city of Charlotte, North Carolina and surrounding Mecklenburg County, had more than eighty-four thousand pupils in one hundred and seven schools. Approximately twenty-one thousand of these pupils were Negroes who attended school within the city of Charlotte. More than fourteen thousand of these Negro students went to schools which had either a total or a ninety-nine percent Negro enrollment. This situation existed despite previous litigation which resulted in a desegregation plan combining geographic zoning with a free transfer provision. In 1968 petitioner Swann, on behalf of his children and others similarly situated, asserted that the ineffectiveness of the plan was a denial of equal protection of the laws, and asked for immediate desegregation,[1] basing the claim on the Supreme Court's holding in *Green v. County School Board of New Kent County*.[2]

After considering various plans involving combinations of zoning, pairing, bussing, and grouping, the district court imposed a plan designed by a court appointed expert.[3] On appeal, the Supreme Court affirmed, holding racial quotas, zoning, and transportation to be effective tools in ending segregation and achieving equal protection of the laws in public schools. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The decision marks the first affirmative pronouncement by the United States Supreme Court on the practicalities of effecting the constitutional principle of equal protection of the laws in the public schools. The pur-

1. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358 (W.D. N.C. 1969).

2. 391 U.S. 430 (1968) (discussed *infra* note 45).

3. Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265 (W.D. N.C. 1970). This order was appealed, vacated, and remanded for further consideration of the assignment of pupils in the elementary schools. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970). The Supreme Court declined to disturb the circuit court order, 397 U.S. 978 (1970). However, later the Supreme Court granted certiorari, on the condition that the original district court order be reinstated pending further hearings there, 399 U.S. 926 (1970). The expert's plan was left in effect when the board failed to come forward with an effective proposal, 318 F. Supp. 786 (1970). Finally, in response to both parties' writs the Supreme Court granted certiorari, 400 U.S. 805 (1970).

pose of this case note is to analyze the reasoning and scope of this decision, using the background of case law.

Fundamental to a consideration of the decision is the realization that Swann's basis for relief was founded on the "equal protection" clause of the fourteenth amendment.[4] The original purpose and design of this amendment was to guarantee the newly emancipated Negroes the protection of those privileges and immunities to which they were constitutionally entitled, and to make the races equal before the law.[5] However, the avowed purpose of the equal protection clause was thwarted by the Supreme Court's subsequent acceptance of the "separate but equal" doctrine expressed in *Plessy v. Ferguson.*[6] It should be stated in retrospect that the *Plessy* decision was an accurate reflection of the social philosophy of the times,[7] but the Court's decision was nonetheless a philosophical regression.

Once the *Plessy* doctrine was established the Supreme Court had

4. U.S. Const. amend. XIV, § 1 is applicable: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872). *Accord,* Strauder v. West Virginia, 100 U.S. 303 (1880), wherein the Court expressed its view of the amendment's purpose in this way: "It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons. . . . [W]hat is this but declaring the law in the states shall be the same for the black as for the white; that all persons whether colored or white, shall stand equal before the law of the states. . . ."

6. 163 U.S. 537 (1896). In speaking to Plessy's contention that separate railroad accommodations were a denial of "equal protection," the Court said: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality. . . . Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . (it is only their construction of it as such). . . ." *Id.* at 544. This language was responsible for the principle that "separate but equal" satisfied the requirements of the Fourteenth Amendment.

7. The principle of "separate but equal" was customarily embraced by the decisional law of the state and lower federal courts prior to as well as after the passage of the Fourteenth Amendment. *See, e.g.,* Bertonneau v. Board of Directors, 3 F. Cas. 294 (No. 1,361) (C.C.D. La. 1878); Ward v. Flood, 48 Cal. 36, 17 Am. R. 405 (Cal. 1874); Cory v. Carter, 48 Ind. 327 (1874); Roberts v. City of Boston, 5 Cush. 198 (Mass. 1849); Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891); People *ex rel* King v. Gallagher, 93 N.Y. 438 (Ct. App. 1883); Ohio *ex rel* Garnes v. McCann, 21 Ohio St. 198 (1871).

little difficulty in applying it to education,[8] yet subsequent decisions gradually sapped the doctrine's vitality. Equivalence in facilities and opportunities were held initially to comply with the amendment's requirements,[9] however, the opportunities had to be offered within the state.[10] An extension of this reasoning was the Court's insistence that compliance with the equal protection clause meant that any special opportunity afforded one race had to be provided for the other.[11] The equivalence criterion was extended further when the Court held in *Sweat v. Painter*[12] that even if separate schools existed, the intangible qualities of school composition, such as reputation, experience of faculty, and administration, as well as the tangible qualities had to be equal. Finally, if separate schools did not exist, or if they did and the intangible factors were unequal, the remedy was to require prompt admission of the petitioner to the formerly all white school.[13] This prompted the Court to decree that once Negroes were admitted to a school, segregation *within* the institution was a denial of equal opportunity.[14] The practical result of these rulings was to end segregation in higher education. The philosophical significance was the

8. *See*, Lum v. Rice, 275 U.S. 78 (1927). Although the issue of segregated schools per se had never been directly before the Supreme Court, Chief Justice Taft had this to say: "Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution." *Id.* at 85-6. State and federal courts had applied the principle to education long before this decision. *See, e.g.*, Berea College v. Ky., 211 U.S. 45 (1908); Cumming v. Richmond County, 175 U.S. 528 (1899); and cases cited *supra* note 7.

9. Williams v. Board of Educ., 79 Kan. 202, 99 P. 216 (1908); Jones v. Board of Educ., 90 Okla. 233, 217 P. 400 (1923). *But see* Cumming v. Richmond, *supra* note 8; Dameron v. Bayless, 14 Ariz. 180, 126 P. 273 (1912).

10. Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938). The Court found that the state violated the equal protection clause by providing a law school for whites, but not for Negroes, and by requiring Negroes desirous of a legal education to attend schools outside the state. For a state decision with an identical holding *see*, University of Maryland v. Murray, 169 Md. 478, 182 A. 590 (1935).

11. Sipuel v. Board of Regents, 332 U.S. 631 (1948).

12. 339 U.S. 629 (1950). Sweatt sought admission to the University of Texas Law School and was denied because of his race. In an attempt to comply with the existing standards of equality, a new law school for Negroes was created. In comparing the new law school with the University of Texas Law School, the Court stated: "What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.* at 634.

13. *See* cases cited, *supra* notes 10, 11 and 12.

14. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

erosion of "separate but equal" to a point where its ultimate reversal was logically consistent.

While Supreme Court decisions gradually eroded *Plessy*, the lower federal courts handled the problem in a different manner. They adopted the Supreme Court's reasoning that substantial equality of facilities and opportunities was required by the equal protection clause, but the lower federal courts usually ordered the school board to provide equal facilities rather than to require that the petitioner be admitted to the white school.[15] Since a dual system existed, the lower courts found it more practical to require simply an upgrading of the deficient system.

Amidst this philosophical and historical setting, *Brown v. Board of Education*[16] (hereafter referred to as *Brown I)* was decided in 1954. In unanimously holding that the "separate but equal" doctrine was a denial of equal protection, the Court made several points of significance. First, the Court, through Chief Justice Warren, reiterated the purposes of the fourteenth amendment.[17] While these purposes were not determinative of the issue before the Court,[18] the effect of the decision was to achieve ideological consistency between decisional and constitutional philosophy. The Chief Justice rendered the equivalence argument obsolete by stating:

> Our decision, therefore cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.[19]

This entrance into subjectivity highlighted the human aspect of the problem. Chief Justice Warren revealed the human concern most poignantly by citing with approval the lower courts' description of the harm as follows:

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15. *See, e.g.*, Wichita Falls Junior College Dist. v. Battle, 204 F.2d 632 (5th Cir. 1953); Winbourne v. Taylor, 195 F.2d 649 (4th Cir. 1952); Briggs v. Elliott, 98 F. Supp. 529 (E.D. S.C. 1951), *rev'd*, 342 U.S. 350 (1952). Butler v. Wilemon, 86 F. Supp. 397 (N.D. Tex. 1949). In *Butler*, the court, reflecting this position, stated: "Under the Fourteenth Amendment, Negro students are entitled to public educational facilities substantially equal to those furnished to white students. If that has not been done, then the Negro citizen and taxpayers are entitled to an injunction compelling equalization of such facilities." *Id.* at 399. Conceding that substantial equality was required, the courts restricted their remedy to equalizing existing schools. *See* Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951); Hayes v. Crutcher, 108 F. Supp. 582 (W.D. Pa. 1953). *But see* Miller v. Board of Educ., 106 F. Supp. 988 (D.D.C. 1952); Gray v. Board of Trustees, 100 F. Supp. 113 (E.D. Tenn. 1951), *appeal denied*, 342 U.S. 517 (1952).

16. 347 U.S. 483 (1954).

17. *Id.* at 487.

18. *Supra* note 16, at 489.

19. *Supra* note 16, at 492.

> Segregation with the sanction of law . . . has a tendency to (retard) the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.[20]

This concept has proven to be the underlying reason behind the conclusion that dual systems are a denial of equal protection. The Court concluded, "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[21]

The broad constitutional principle announced by the Court in *Brown I* established the substantive right to relief, which all subsequent petitioners, including Swann, were to ask the Court to enforce. The ensuing discussion will illustrate the extent and means by which enforcement has occurred, up to and including the instant case. It should be kept in mind that the general principles to be considered have had their major application to situations where segregation involved state action.

In the second *Brown v. Board of Education* case[22] (hereinafter referred to as *Brown II*) the Supreme Court dealt with implementation in a manner which evidenced their concern with the monumental problems that lay ahead. Sensitive to the variety of local problems and the social mood of the times, the Court cautiously worded its relief in broad, inexact terms. The Court placed the responsibility of conforming with the constitutional principles of *Brown I* on the school boards. The role of the courts was "to consider whether the action of school authorities constitutes good faith implementation. . . ."[23] School boards had to proceed "with all deliberate speed,"[24] but would be allowed extensions of time necessary to carry out effectively their constitutional burden. The reasoning was that the court best equipped to handle the enforcement and management problems would be the district courts, because of their closeness and sensitivity to the local situation. The general formula of relief enunciated in *Brown II* can be properly recorded as the first phase of implementation.

In the wake of *Brown II*, several decisions were rendered dealing with the problems of implementation.[25] Interpretation of the guidelines

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20. *Supra* note 16, at 494.

21. *Supra* note 16, at 495.

22. 349 U.S. 294 (1955).

23. *Id.* at 299.

24. *Supra* note 22, at 301.

25. *See, e.g.*, Hawkins v. Board of Control, 350 U.S. 413 (1956); Lucy v. Adams, 350 U.S. 1 (1955); Jackson v. Rawdon, 235 F.2d 93 (5th Cir. 1956), *cert. denied*, 352 U.S. 925 (1956); Brown v. Rippy, 233 F.2d 796 (5th Cir. 1956); Matthews v. Launius, 134 F. Supp. 684 (W.D. Ark. 1955). The Supreme Court

formulated by the Supreme Court to achieve enforcement presented a major obstacle to the early work of implementation,[26] and active circumvention by the school boards of the constitutional principles set down by the Supreme Court further hampered their implementation. This circumvention occurred in a variety of forms, including individual resistance,[27] state action in the exercise of state "police power,"[28] innocent zoning laws which perpetuated segregation,[29] and, pupil assignment laws

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decisions in *Hawkins* and *Lucy* dealt with higher education, so implementation was afforded by merely requiring admission of the petitioner to the formerly all white schools. On the other hand, the circuit court cases of *Brown v. Rippy*, and *Jackson v. Rawdon*, and those discussed below, were concerned with implementation at lower levels of education. *See* sources cited *infra* notes 26, 27, 28, 29 and 30.

26. *See generally*, Papale, *Judicial Enforcement of Desegregation: Its Problems and Limitations*, 52 NW. U.L. REV. 301 (1957). Typically, cases involving similar factual patterns would have somewhat inconsistent holdings based on the same guideline found in *Brown II*. *Compare* Evans v. Buchanan, 172 F. Supp. 508 (1959), *rev'd*, 281 F.2d 385, *cert. denied*, 364 U.S. 802 (1960), where the district court found a plan of desegregation taking twelve years to complete to be reasonable and consistent with "all deliberate speed" *with* McSwain v. County School Bd. of Educ., 138 F. Supp. 570 (E.D. Tenn. 1956), where the court recited: "It is the opinion of this Court that desegregation . . . should be effected by a definite date and that a reasonable date should be fixed as one not later than the beginning of the fall term of the present year. . . ." The difference in interpretation of "reasonable" is due more to lack of a definite standard than individual quirks. *See* Aaron v. Cooper, 243 F.2d 361 (8th Cir. 1957), *cert. denied*, 357 U.S. 566 (1958); Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir. 1957); Brown v. Rippy, *supra* note 25 (Cameron's dissent); Davis v. County School Bd., 149 F. Supp. 431 (E.D. Va. 1957).

27. Hoxie School Dist. No. 46 v. Brewer, 137 F. Supp. 364 (E.D. Ark. 1956).

28. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958), where the Governor of Arkansas used the National Guard to close a school which had complied with its constitutional duty by desegregating. The school board then argued for postponement to preserve the peace. The Court answered this argument by citing with approval *Buchanan v. Warley*, 245 U.S. 60, 81 (1917) as follows: "It is urged that this proposed segregation will preserve the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 358 U.S. at 16. *Accord*, Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 294 (1957); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd*, 361 U.S. 197 (1960); James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959), *appeal denied*, 359 U.S. 1006. *See also*, Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386 (4th Cir. 1955).

29. Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D. N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D. N.Y. 1962); Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958). The *Clemons* court said this about such zoning laws: "[t]he establishment for the first time in Hillsboro of a zoning system . . . designed to embrace practically the entire colored population of the city, was brought about as a subterfuge to segregate children who had been

with accompanying endless administrative procedures.[30] Remedial action in the courts operated in a piecemeal fashion; judicial relief was usually sought to eliminate evasive tactics and the courts focused on what the school boards could not do. What was needed was an affirmative assertion of the school board's duty, and the Supreme Court, in the *Swann* decision, attempted to fulfill that need.

However, to facilitate comprehension of the implications of *Swann's* more precise definition of the school board's duty, it is necessary to examine first the concept of duty as it appeared in previous decisions.

The first explicit pronouncement as to the school board's duty in light of *Brown I* came in *Briggs v. Elliott*.[31] The court expounded on the language of *Brown I* by stating:

> The Constitution, in other words, *does not require integration.* It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.[32]

This dictum gave support to a line of decisions which in their tolerance of passiveness overlooked the impact of the psychological harm proscribed in *Brown I*.[33]

The contrary approach, requiring affirmative integration, stems from a 1961 New York District Court decision, *Taylor v. Board of Education of City School District*.[34] The school system operated under the "neighborhood school" policy. The attendance zones had been drawn in 1949 with the purpose of fostering segregation, and these same boundaries existed at the time of the suit. In holding that there was a duty to undo past acts of segregation, the court stated that, "[n]ecessarily implied in its proscription of segregation was the positive obligation of eliminating

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admitted to Webster and Washington Schools [two all white schools]." 228 F.2d at 856. Though the validity of such laws was questionable, the duty was on the segregated party to come forward and show the discriminatory motivation.

30. *See* Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (5th Cir. 1964); Jeffers v. Whitely, 309 F.2d 621 (4th Cir. 1962); Norwood v. Tucker, 287 F.2d 798 (8th Cir. 1961); McCoy v. Greensboro Bd. of Educ., 283 F.2d 667 (4th Cir. 1960). Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); School Bd. v. Atkins, 246 F.2d 325 (4th Cir. 1957), *cert. denied*, 355 U.S. 855 (1957); Orleans Parish School Bd. v. Bush, *supra* note 28; Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

31. 132 F. Supp. 776 (E.D. S.C. 1955).

32. *Id.* at 777 (emphasis added).

33. *See, e.g.*, Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958); Avery v. Wichita Falls Independent School Dist., 241 F.2d 230 (5th Cir. 1957); Thompson v. County School Bd., 204 F. Supp. 620 (E.D. Va. 1962); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962).

34. 191 F. Supp. 181 (S.D. N.Y. 1961).

it."[35] Assuming the validity of this duty, the principle problem became how it was to be achieved. As to the efficacy of neighborhood school plans in fulfilling this duty, the *Taylor* court said:

> The neighborhood school policy certainly is not sacrosanct. It is valid only insofar as it is operated within the confines established by the Constitution.[36]

The evident import was that "neighborhood schools," used in a manner to perpetuate segregation, would be struck down.

The most prevelant device utilized by the school boards in attempting to satisfy the standard of affirmative integration was "freedom of choice."[37] Determination of the effectiveness of "freedom of choice" plans was a source of constant litigation in the lower courts.[38] To warrant court approval, early requirements of "free choice" were that it be exercised annually, that it be truly free from pressures by the board, and, that it incorporate a plan for faculty and staff desegregation.[39] The intendment was that there be actual integration. However, mainly because of social pressures or failure to exercise a choice, the plan served to perpetuate segregation and this was responsible for its popularity among formerly de jure segregated systems.

Finally, in an effort to clarify the duty of the school board and set up a guideline for determining when that duty is met, Circuit Judge Wisdom in *United States v. Jefferson County Board of Education*[40] stated that "[t]he United States Constitution as construed in *Brown* requires public school systems to integrate students, faculties, facilities and activities."[41] This is clearly a repudiation of the *Briggs v. Elliot*[42] reasoning and is wholly consistent with the tenor of *Brown I*. As to when a desegregation plan should be deemed effective, Judge Wisdom simply stated that,

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35. *Id.* at 193.

36. *Id.* at 195.

37. In 1965 almost 57 percent of the desegregation plans approved by the Department of Health, Education, and Welfare for receipt of federal funds were based on "freedom of choice." *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, 29 (1966).

38. *See* Bowman v. County School Bd., 382 F.2d 326 (4th Cir. 1967); Kelley v. Altheimer Arkansas Pub. School Dist. No. 22, 378 F.2d 483 (8th Cir. 1967); Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965); Wheeler v. Durham City Bd. of Educ., 346 F.2d 768 (4th Cir. 1965); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd*, 389 U.S. 215 (1967); Bell v. School Bd., 249 F. Supp. 249 (W.D. Va. 1966); Brown v. County School Bd., 245 F. Supp. 549 (W.D. Va. 1965).

39. *See* Kelly v. Altheimer Arkansas Pub. School Dist. No. 22, *supra* note 38.

40. 372 F.2d 836 (7th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

41. *Id.* at 845.

42. *Supra* note 31.

"[t]he only school desegregation plan that meets constitutional standards is one that works."[43] This standard is one which can easily be employed by a court and would be impossible for a school board to conceal. In reviewing a specific "freedom of choice" plan, Judge Wisdom further stated:

> Freedom of choice plans may . . . be invalid because the 'freedom of choice' is illusory. The plan must be tested not only by its provisions, but by the manner in which it operates to provide opportunities for a desegregated education.[44]

Ultimately, this reasoning was to provide the basis for the Supreme Court's decision in *Swann* which embodies these principles.

In *Green v. County School Board of New Kent County*,[45] the Supreme Court was presented with a "freedom of choice" plan which had operated for three years without promoting any integration. Prior to *Brown I* the school board had operated segregated schools in conformity with state laws. In holding that the respondent school board had not met its constitutional duty as defined in *Brown I*, the Court stated:

> School Boards such as the respondent then operating [at time of *Brown I*] state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.[46]

The Supreme Court alleviated the confusion which existed as to the duty of school boards and provided new grounds for attacking existing segregation. To emphasize the clear meaning of their decision, the Supreme Court added that, "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[47] This candid and severe criticism by the Court of "freedom of choice" plans had the practical effect of eliminating another in a long line of evasive tactics.[48]

While the courts scrutinized "freedom of choice" plans, eventually requiring *immediate* affirmative action by the school board to integrate, a

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43. *Supra* note 40, at 847.

44. *Supra* note 40, at 889.

45. *Supra* note 2.

46. *Supra* note 2, at 437.

47. *Supra* note 2, at 439.

48. *See* United States v. Indianola Municipal Separate School Dist., 410 F.2d 626 (5th Cir. 1969), *cert. denied*, 396 U.S. 1011 (1969); Felder v. Harnett County Bd. of Educ., 409 F.2d 1070 (4th Cir. 1969); Anthony v. Marshall County Bd. of Educ., 409 F.2d 1287 (5th Cir. 1969); United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086 (5th Cir. 1969); Adams v. Mathews, 403 F.2d 181 (5th Cir. 1968), *cert. denied*, 396 U.S. 802 (1969); Board of Pub. Instruction v. Braxton, 402 F.2d 900 (5th Cir. 1968); Jackson v. Marvell School Dist., 389 F.2d 740 (8th Cir. 1968).

parallel development concerning "transfer plans" culminated in *Monroe v. Board of Commissioners*,[49] decided the same day as *Green*.[50] The Court in *Monroe* struck down the "transfer plan" because of its ineffectiveness in establishing an immediate unitary system. *Swann* gave full acceptance to that line of reasoning which culminated in the decisions by the Supreme Court defining the objectives to be reached and requiring affirmative realistic action to achieve them by the school board. The Court in *Swann* established further the immediacy with which these objectives should be achieved by reaffirming the mandate found in *Alexander v. Holmes County Board of Education*.[51] In the *Alexander* decision the Court held that the operation of segregated schools under the auspices of "all deliberate speed" was no longer constitutionally permissible. School boards were required to terminate immediately dual school systems and operate only unitary ones.[52]

The Supreme Court in *Swann* aligned itself with the principles and objections set forth in the *Green* and *Alexander* decisions. In considering the application of these principles, the Court came to grips with the evident gap between the conceptual duty and its practical attainment.

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49. 391 U.S. 450 (1968). *Accord,* Goss v. Board of Educ., 373 U.S. 526 (1963). For the steady progression to *Monroe, see* Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied,* 380 U.S. 923 (1964); Wheeler v. Durham City Bd. of Educ., 309 F.2d 630 (4th Cir. 1962); Dodson v. School Bd., 289 F.2d 439 (4th Cir. 1961). The Court in *Downs* held the "transfer plan" there to be invalid, stating that, "[A] transfer plan or policy such as the one adopted by the Board in this case, whereby a student might transfer out of a desegregated school if a majority of the students in that school are of a different race than the student seeking such transfer is invalid." 336 F.2d at 995. Such an obvious attempt at circumvention could not be tolerated. *Dodson* and *Wheeler* dealt with valid "transfer plans" which were declared invalid because of unconstitutional application of external criteria to one race seeking transfers and not the other.

50. *Supra* note 2.

51. 396 U.S. 19 (1969). For the historical evolution of the *Alexander* mandate *see* Griffin v. School Bd., 377 U.S. 218 (1964); Goss v. Board of Educ., *supra* note 49. The Court in *Griffin* averred: "The time for mere 'deliberate speed' has run out and that phrase can no longer justify denying these Prince Edward County School Children their constitutional rights to an education. . . ." 377 U.S. at 234. Finally, patience with dilatory school boards operating segregated schools was waning. *See* Watson v. Memphis, 373 U.S. 526 (1962); Lee v. Macon County School Bd. of Educ., *supra* note 38; Bell v. School Bd., *supra* note 38.

52. Alexander v. Holmes County Bd. of Educ., *supra* note 51. *Accord,* Carter v. West Feliciana School Bd., 396 U.S. 290 (1970); Dowell v. Board of Educ., 396 U.S. 269 (1969); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1970); United States v. Hinds County School Bd., 423 F.2d 1264 (5th Cir. 1969); Nesbit v. Statesville City Bd. of Educ., 418 F.2d 1040 (4th Cir. 1969).

The remainder of this case note will illustrate how the Court, by amplifying the duty concept, attempted to bridge that gap.

Although the central issue before the Court in *Swann* concerned pupil assignment problems, Chief Justice Burger noted:

> [W]e pointed out that existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities and facilities were among the most important indicia of a segregated system. . . . When a system has been dual in these respects, *the first responsibility of school authorities is to eliminate invidious racial distinctions.*[53]

While it is apparent that these considerations are relevant in determining the effectiveness of any desegregation plan, their attainment was hindered by the qualification that race could not be considered in desegregating these areas.[54] Indeed, this argument was advanced by the school authorities in *Swann* and quickly rejected by the Court.[55]

Support for the argument that race can be considered in formulating a desegregation plan is found in several lower court decisions,[56] the most notable of which is *United States v. Jefferson County Board of Education.*[57] Judge Wisdom expressed the view, as noted above, that school boards should desegregate faculty, staff, transportation, facilities and activities as well as students. Furthermore, he stated:

> Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities. . . . School officials have to know the racial composition of their school populations. . . . The courts . . . can't measure good faith or compliance without taking race into account.[58]

Logic supported the court's position in this argument, since the only practical way of converting a dual system to a unitary one was by considering the race of those in attendance.

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53. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, at 18-19 (1971) (emphasis added).

54. The contention was based on: Civil Rights Act, 42 U.S.C. §§ 2000c(b) and 2000c-6 (1964). The respondents construed these sections as saying that desegregation could not be achieved by assigning pupils on the basis of race or transporting them on the basis of race. *See* Plessy v. Ferguson, *supra* note 6 (Harlan's dissent).

55. *Supra* note 53. Chief Justice Burger stated: "In short, there is nothing in the Act (Civil Rights Act) which provides us material assistance in answering the question of remedy for state imposed segregation in violation of *Brown I.*" *Supra* note 53, at 18. In other words, the Court would rely on decisional reasoning in arriving at its definition.

56. *See, e.g.,* Kier v. County School Bd., 249 F. Supp. 239 (W.D. Va. 1966), where in reference to faculty desegregation the court held race to be relevant in arriving at the proper ratio.

57. *Supra* note 40.

58. *Supra* note 40, at 877.

Once these areas of a dual system have been successfully put into operation under unitary standards, the focus of the problem shifts to the assignment of students on a unitary basis. An overview of the approach adopted by the Court in *Swann* to the problem of school assignment can be found in earlier Supreme Court decisions. The Court in *Green*[59] pinpointed the problem in stating that "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case."[60] Therefore, the use of alternative plans and combinations is potentially more likely now to achieve desegregation.

Further emphasis on this broad approach appears in *Carter v. West Feliciana School Board.*[61] The Court, through Justices Harlan and White's concurring opinion, expressed its views as to the method to eliminate all vestiges of segregation:

> Such relief, I believe it was intended, should consist of an order providing measures for achieving disestablishment of segregated school systems, and should, if appropriate, include provisions for pupil and teacher reassignments, rezoning, or any other steps necessary to accomplish the desegregation of the public schools. . . .[62]

The guidelines formulated in *Swann* reflect the spirit of this statement, since they invoke a variety of techniques.

A major obstacle to any student assignment plan in a large city is that of racial balance. Chief Justice Burger addressed himself to the problem by stating that the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[63] The usefulness of this statement as a practical clarification of the school board's duty cannot be underestimated, since at one time student-assignment plans were considerd unacceptable, without regard to the circumstances, if one all-Negro school existed.[64] The underlying reasoning in these decisions

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59. *Supra* note 2.

60. *Supra* note 2, at 439.

61. *Supra* note 52. Nesbit v. Statesville City Bd. of Educ., *supra* note 52; United States v. Indianola Municipal Separate School Dist., *supra* note 48; Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir. 1969); United States v. Jefferson County School Bd., *supra* note 40, at 895-96, where the Court related: "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute. . . ." The tenor of this statement had a noticeable influence on the *Swann* Court in formulating its guidelines.

62. *Supra* note 52, at 292.

63. Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra* note 53, at 24.

64. *See, e.g.*, Adams v. Mathews, *supra* note 48; Hall v. St. Helena Parish

was that racial imbalance, whether adventitious or state coerced, resulted in the psychological harm proscribed by *Brown*.[65] The opposing line of reasoning, employed in the *Swann* decision, evolved from a district court ruling in *Bell v. School City of Gary*.[66] The pertinent language used by the court was:

> I have seen nothing . . . which leads me to believe that the law requires that a school system developed on the neighborhood school plan . . . must be destroyed or abandoned because the resulting effect is to have racial imbalance in certain schools where the district is populated entirely by Negroes or Whites . . . and these expressions lead me to believe that racial balance in our public schools is not constitutionally mandated.[67]

Although the factual pattern involved de facto segregation, the position on racial balances was accepted by courts dealing with de jure segregation and had the force of logic behind it.[68]

It is interesting to note that in the analogous area of faculty desegregation the Supreme Court, in *United States v. Montgomery Board of Education*,[69] held that the application of a fixed ratio was acceptable. Recognition of the incurrence of few administrative problems in faculty desegregation led to the acceptance of fixed ratios. The workability of ratios in this area undoubtedly contributed to the Court's approval of them as guiding indices in student assignment problems.

Closely intertwined with the problem of racial balance is the problem of the existence of a one race school within the system. In urban areas, there are obvious limitations upon the application of an absolute standard

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School Bd., *supra* note 61; United States v. Hinds County School Bd., *supra* note 52, related order reversed *sub nom.* Alexander v. Holmes County Bd. of Educ., *supra* note 51. The court in *Hall* remarked: "If under an existent plan there are no whites, or only a small percentage of whites, attending formerly all-Negro schools . . . then the plan as matter of law, is not working." 417 F.2d at 807. *But see*, Singleton v. Jackson Municipal Separate School Dist., *supra* note 52.

65. *See generally* Fiss, *Racial Imbalance*, 78 HARV. L. REV. 564 (1965).

66. 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd* 324 F.2d 209, *cert. denied*, 377 U.S. 924 (1964).

67. *Id.* at 829.

68. *See* United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967); wherein the court recited: "The percentages referred to in the Guidelines and in this Court's decrees are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are *not a method for setting quotas or striking a balance.*" *Id.* at 390 (emphasis added). Propriety as a tool for determination of whether the constitutional method is met is unquestioned; its the use as an absolute which is objected to. *Accord*, Deal v. Cincinnati Bd. of Educ., 419 F.2d 1387 (6th Cir. 1969); Downs v. Board of Educ., *supra* note 49.

69. 395 U.S. 225 (1969). *See* Bradley v. School Bd., 382 U.S. 103 (1965); Jackson v. Marvell School Dist., *supra* note 48; Kier v. County School Bd., *supra* note 56.

prohibiting schools from being composed of a single race. In addressing itself to this problem and holding that the existence of a one race school in a system was not *per se* a constitutional violation,[70] the Court in *Swann* exercised the rule of reason. In clarifying this guideline, the Court gave their approval of majority group to minority school transfer plans, and implied that the existence of this plan in a system where a one race school exists would sufficiently overcome the presumption that the system is discriminating.[71] Evolution of this conclusion proceeded in the following manner.

During the circuit court phase of development of guidelines to implement immediately *Brown's* decrees, there was a tendency to require the termination of all one race schools.[72] The argument was based on the reasoning of a group of cases which required racial balancing. However, in terms of practical utility, the better reasoned cases rejected such an absolute and were embodied in *Swann's* guideline. For example, the circuit court, in *Kemp v. Beasley*,[73] in determining the validity of a school board's plan in light of *Green*, held:

> We certainly can conceive of a fully desegregated system where percentages do vary from school to school and where even one school might have a black majority and another a white majority but still, when all factors are fairly and unemotionally considered, the system is 'unitized'. . . .[74]

This reasoning, as well as the inherent practical considerations implicit in it, persuaded the *Swann* Court to promulgate this flexible approach as a guideline in determining the effectiveness of a desegregation plan.

Support for the approval of a majority to minority transfer plan is found in *Ellis v. Board of Public Instruction of Orange County, Florida*,[75]

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70. *Supra* note 53, at 26.

71. *Supra* note 53, at 26.

72. *See* Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir. 1969), wherein the court expressed the feeling that the district's plan was too slow to be acceptable and noted: "If there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet the constitutional standards. . . ." *Id.* at 689. While this may have merit in a rural de jure system, too many factors in urban areas other than de jure school segregation affect the composition of the school.

73. 423 F.2d 851 (8th Cir. 1970).

74. *Id.* at 857. *See* Bradley v. Board of Pub. Instruction, 431 F.2d 1377 (5th Cir. 1970); Ellis v. Board of Pub. Instruction, 423 F.2d 203 (5th Cir. 1970); Valley v. Rapids Parish School Bd., 423 F.2d 1132 (5th Cir. 1970); United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1085 (5th Cir. 1969); Goss v. Board of Educ., 406 F.2d 1183 (6th Cir. 1969); Deal v. Cincinnati Bd. of Educ., *supra* note 68; *see also*, Warner v. County School Bd., 357 F.2d 452 (4th Cir. 1966).

75. *Supra* note 74.

where the fifth circuit approved the utilization of this technique in a desegregation plan. Implicit in the *Swann* Court's reasoning was that the acceptability of this technique was contingent upon its incorporation in a plan employing a variety of techniques.[76]

In determining when a school board's plan meets constitutional standards, the above discussion illustrates what the school board does *not* have to do in assigning pupils. The present discussion turns to the remedies available when a student assignment plan fails to meet its constitutional burden. Chief Justice Burger established clearly several methods for achieving the objective of dismantling dual systems when he stated:

> We hold that the pairing and grouping of non-contiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought.[77]

The significance of this statement is evident: The Supreme Court, in affirmative language, has enumerated the devices to achieve desegregation.

Remedial zoning has received wide support from legal commentators and lower court decisions.[78] It must be remembered that the general method of student assignment is based on the neighborhood school plan. The vulnerability of this method of assignment received judicial exposure in *Taylor v. Board of Education of New Rochelle*,[79] where the court

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76. *Supra* note 53, at 28. *But see*, Monroe v. Board of Commissioners, *supra* note 49. The majority to minority transfer plan is an offshoot of the "free transfer" plan struck down by the *Monroe* Court. The plan operates by registering children in schools and then allowing them to transfer wherever they wish to go. The Court averred: "No attempt has been made to justify the transfer provision as a device designed to meet 'legitimate legal problems;' rather it patently operates as a device to *allow* resegregation of the races. . . ." *Supra* note 49, at 459. While a majority to minority plan will not resegregate, because of social pressures it can operate to allow segregation by not being used. Furthermore, it places the burden of desegregation on the pupils rather than on the board.

77. *Supra* note 53, at 28-29.

78. *See generally* Fiss, *Racial Imbalance, supra* note 62. *See* Andrews v. City of Monroe, 425 F.2d 1017 (5th Cir. 1970), where the court remanded a district court order rejecting a modified neighborhood school plan which used pairing; United States v. Board of Trustees of Crosby Independent School Dist., 424 F.2d 625 (5th Cir. 1970), where the court approved a plan which included pairing but vacated the part allowing extension; Nesbit v. Statesville City Bd. of Educ., *supra* note 52; United States v. Indianola Municipal Separate School Dist., *supra* note 48. The *Nesbit* Court, reviewing a desegregation plan, remarked: "The plan for Statesville must provide for the elimination of the racial characteristics of Morningside School by pairing, zoning or consolidation. . . ." *Supra* note 52, at 1042. These remedial tools are best suited to satisfy the immediacy of the duty. *See*, Brewer v. School Bd., 397 F.2d 37 (4th Cir. 1968); United States v. Board of Pub. Instruction, 395 F.2d 66 (5th Cir. 1968); Wright v. County School Bd., 252 F. Supp. 378 (E.D. Va. 1966); Bell v. School Bd., *supra* note 38.

79. *Supra* note 34.

expressed its view of the neighborhood school policy by finding that if it did not achieve integration, it was invalid.[80] The basis for erosion of the neighborhood school concept was established by this finding, and by the time *Hall v. St. Helena Parish School Board*,[81] was decided in 1969, there was widespread readiness to dispense with any plan which evidently was not workable, and to experiment with remedial devices. The Court revealed:

> There are many methods and combinations of methods available for consideration. . . . Some of these are geographic zoning if it tends to disestablish the dual system, . . . pairing of grades or schools, educational clusters . . . majority-to-minority transfers.[82]

The Court in *Swann* based its guidelines on these techniques with the intention of achieving immediate fulfillment of the constitutional principles of *Brown*.

Bussing is another affirmative device to conform the plan for student assignment with the principles of *Brown I* and *Green*. In *Swann*, bussing is given cautious approval by Chief Justice Burger with these words:

> In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. . . .
>
> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.[83]

Again, the guideline is tempered by referring to a rule of reason in its operation.

Bussing has long been an accepted practice in the administration of education. In de jure systems it was used as a device for perpetuating segregation. The early development of the reasoning culminating in *Swann* was to the effect that if it was used to perpetuate segregation, it could just as easily be used to end it.[84] The use of bussing to end segregation was actually considered to be contrary to the intention of the Civil Rights Act of 1964.[85] While bussing was not utilized to over-

80. *Accord*, Henry v. Clarksdale Municipal Separate School Dist., *supra* note 72.

81. *Supra* note 61.

82. *Supra* note 61, at 809. *See* Singleton v. Jackson Municipal Separate School Dist., *supra* note 52; Felder v. Harnett County Bd. of Educ., 409 F.2d 1070 (4th Cir. 1969).

83. *Supra* note 53, at 30-31.

84. *See* Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Downs v. Board of Educ. of Kansas City, *supra* note 49.

85. 42 U.S.C. 2000(c) (1964). *See* United States v. Board of Trustees of Crosby Independent School Dist., *supra* note 80; United States v. Jefferson County School Bd., *supra* note 40.

come segregation, it was reviewed by the courts in determining whether discriminatory practices existed in its use.[86] Even if it was not affirmatively used to overcome segregation it could not be used to discourage desegregation.[87] This prohibition on the negative use of bussing led to its logical extension—positive use in desegregation. The fifth circuit's decision in *Taylor v. Ouachita Parish School Board*,[88] led to the positive use of bussing and the rule of reason adopted in *Swann*. The Court reviewed a plan which invoked bussing to achieve integration, and found that while bussing was acceptable as a tool, it was unreasonable under the circumstances since there was no room to place the children bussed. In formulating its guidelines on bussing, the Court in *Swann*, manifesting the spirit of this latter reasoning, insured the workability of bussing by not announcing it as an absolute.

Although prospective application of the *Swann* decision will be limited by the fact that it is in the form of guidelines and therefore subject to conflicting lower court interpretation,[89] its usefulness as an impetus to ultimate desegregation can be foreseen. First, as applied to formerly de jure systems, the real effectiveness of the guidelines will be in providing additional grounds for attacking existing segregation. That this will necessitate further litigation is unfortunate, but by providing objective criteria to attack segregation, the day of complete unitary school systems is near. Secondly, application of these guidelines to de facto segregation appears warranted. This contention is supported by the fact that the neighborhood school policy, which is the mainstay of de facto segregation, has been seriously questioned by *Swann* and subsequent decisions.[90] Furthermore, since the techniques enumerated in *Swann* are particularly well suited for urban problems it appears logical to apply them in this area. A further significant point is that *Swann* will lend

86. *See, e.g.*, Singleton v. Jackson Municipal Separate School Dist., *supra* note 52, where the court held use of transportation had to be on a nondiscriminatory basis. United States v. Jefferson County School Bd., *supra* note 40.

87. Kelley v. Altheimer Arkansas Pub. School Dist. No. 22, *supra* note 38, where Judge Heaney confided: "While we have no authority to strike down transportation systems because they are costly and inefficient, we must strike them down if their operation serves to discourage the desegregation of the school system." 378 F.2d at 497. This gave impetus to the affirmative use of transportation.

88. 424 F.2d 324 (5th Cir. 1970).

89. *Compare*, Adams v. School Dist. No. 5, 444 F.2d 99 (4th Cir. 1971), where the court followed the guidelines of *Swann* and tried to eliminate one race schools and authorized use of bussing, *with*, Northcross v. Board of Educ., 444 F.2d 1179 (6th Cir. 1971), where the court noted bussing was not required and exceptions to transfer plans and one race schools were allowed.

90. Goss v. Board of Educ., 444 F.2d 632 (6th Cir. 1971), where the court noted that the neighborhood school is no longer constitutional per se.

support to the developing view that bussing is the ultimate judicial remedy to both de facto and de jure segregation. However, more than any of the other available remedial devices, bussing has become a controversial political issue, and its effectiveness as a judicial tool in bringing current education up to constitutional standards may be severely limited by political maneuvers.[91]

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91. *See, e.g.*, 118 Cong. Rec. 2541-2578 (daily ed. March 24, 1972) where the Senate discussed and voted on the proposed constitutional amendment which would bar federal funds from programs utilizing bussing to overcome racial imbalance and would postpone court ordered bussing until all appeals in connection therewith have been completed. *See also* President Nixon's Message to Congress, Weekly Compilation of Presidential Documents, 590-608, March 20, 1972, where the President proposed legislation to curb federal courts from issuing bussing orders. As a substitute, to end segregation, he suggested the use of existing plans and spending more money in areas of need.